Damages for negligent advice on a financial agreement

Case Note

R Lawyers v Daily

Authors[*] and affiliations[#]

Introduction

As Belinda Fehlberg and Richard Chisholm have written, 'decisions of the High Court are eagerly awaited and closely examined by Australian family lawyers'.[1] The High Court decision of *R Lawyers v Daily*[2] ('*Daily*') is no exception, given that it considers an area of concern to many family lawyers; that is, the damages they may be liable to pay where a financial agreement, made many years prior, is set aside by the court when the lawyer has been negligent in the provision of legal advice on the drafting of the agreement.

A financial agreement can be made pursuant to Pt VIIIA for parties to a marriage and Pt VIIIAB for de facto relationships, of the *Family Law Act 1975* (Cth)('*FLA*'). Such an agreement, if binding, excludes the broad discretion of courts to adjust the financial interests of parties on the breakdown of their relationship. To be binding, the agreement must be signed, independent legal advice must have been provided to each party about the effect of the agreement on the rights of the party and its advantages and disadvantages, at the time the advice is given.[3] An agreement must be valid, enforceable or effective under the general law of contract and equity.[4] It may be set aside on specific grounds which include fraud, impracticability, or where there has been a material change of circumstances relating to the care of a child which would result in hardship. [5] Negligent legal advice is not a ground for setting aside an agreement, but it may lead to circumstances that fall under one of those grounds. Therefore, solicitors may be liable in negligence if they do not exercise a sufficient standard of care in providing advice when drafting or advising on an agreement.

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[1] Belinda Fehlberg and Richard Chisholm, 'The High Court and Family Law: Financial Disputes' (2022) 35 *Australian Journal of Family Law* 217, 217.

[2] [2025] HCA 41.

[3] *Family Law Act* 1975(Cth) ss 90G(1)9b), 90UJ(1)(b). Note that the exact requirements for a financial agreement to be binding differ according to the date on which the agreement was made due to legislative amendments in 2003 and 2009.

[4] Ibid ss 90KA, 90UN.

[5] Ibid ss 90K, 90UM.

Writing in 2012, John Wade commented that 'legal practitioners… who draft financial agreements before or during a marriage or relationship have a high risk of exposure to professional negligence.' [6] Echoing these concerns, empirical research by Miranda Kaye, Lisa Sarmas, Belinda Fehlberg and Bruce Smyth, which involved interviewing 40 Australian family law professionals to explore their views and practices in relation to financial agreements, found that family lawyers had many concerns about the risks and their potential professional liability in advising on financial agreements before marriage or de facto relationships.[7] Participants in that study commented that 'this area of practice was the one area where they feared being sued'.[8] One participant stated that:

> *Lawcover [the NSW professional indemnity insurers] incorporates binding financial agreements within its coverage for family law, but they've certainly indicated that the rise in claims in family law is almost directly attributable to binding financial agreements.* [9]

Participants in the study were concerned with the difficulties inherent in 'crystal ball gazing' or trying to predict the parties' futures, and that claims could arise many years after the drafting of a financial agreement or advice was given.[10] The Daily decision confirms that participants' concerns were justified, but the case also provides some reassurance for family lawyers, because it demonstrates that proving loss or damage for negligent advice on a financial agreement is very difficult.

Factual background and litigation history

Mr and Ms Daily met in 1996, started living together in 1997, and married in late 2005.[11] Two children were born during the marriage, in 2006 and 2009. Over the course of three years prior to their marriage, Mr Daily sought legal advice on multiple occasions from R Lawyers[12] on preparing a financial agreement. Five drafts of financial agreements were prepared and/or amended by R Lawyers and Ms Daily's lawyers during that time. Around

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[6] John Wade, 'The Perils of Prenuptial Financial Agreements: Effectiveness and Professional Negligence.' (2012) 22(3) *Australian Family Lawyer* 24, 24.
[7] Miranda Kaye et al, 'Prenuptial Agreements — What's Happening?' (2023) 36(1) *Australian Journal of Family Law* 38, 56–59.
[8] Ibid 57.
[9] Ibid.
[10] Ibid 59.
[11] *R Lawyers v Mr Daily* [2025] HCA 41 [17].
[12] It is notable that the lawyers in the matter were not identified. R Lawyers is a pseudonym. Part XIVB of the FLA (n**Error! Bookmark not defined.**) (previously s121) provides anonymity and privacy to those involved in family law proceedings. However, given that this case, at least by the time it reaches the High Court, is essentially a negligence matter, not a typical family law matter, it is surely open to debate whether the lawyers should receive the benefit of anonymisation.

July 2005, before marrying, Mr and Ms Daily entered into a binding financial agreement ('BFA) before marriage under s90B. The BFA made no reference to children.

After separation in September 2018, Ms Daily sought an order in the Federal Circuit and Family Court of Australia (Division1) that the BFA was not binding and/ or should be set aside and sought a property settlement order under s79 *FLA*. Mr Daily joined R Lawyers, to the proceedings, suing them for breach of contract and negligence in the event that [the BFA] was either not binding or was set aside. A complicated series of proceedings followed, with multiple appeals and cross-appeals between the commencement of the original proceedings, and the final High Court judgment delivered in November 2025.[13]

In the Division 1 Court Berman J ('the primary judge') found that:

- The BFA was void for uncertainty;[14]
- The wife would experience hardship if the BFA was upheld due to material change in circumstances regarding the care and welfare of the children of the relationship and it should therefore be set aside for hardship;[15]
- It was just and equitable for a s79 order to be made[16] and property settlement orders were made which were more generous to Ms Daily than the terms of the BFA;[17]
- R Lawyers were liable in negligence. The judge awarded partial damages to Mr Daily, only for the wasted costs litigating the uncertainty ground.[18]

In the Division 1 Appellate Court, Mr Daily acknowledged that it was arguable that his contractual claim was statute-barred.[19] That Court upheld the finding of negligence and dismissed Mr Daily's appeal on the property settlement orders. However, the court allowed Mr Daily's appeal on damages for negligence for the loss suffered as a result of the outcome of the application for s79 orders. The court remitted that assessment for rehearing in the Division 1 Court, [20] but before the rehearing occurred, R Lawyers appealed to the High Court.

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[13] *R Lawyers v Mr Daily* [2025] HCA 41.
[14] *Daily v Daily* [2023] FedCFamC1F 222 [97].
[15] Ibid [416]-[424]; *FLA* s 90K(1)(d).
[16] Ibid [125]
[17] The primary judge identified the net pool of assets as $2,168,151 and, on the basis that Ms Daily was entitled to 50 per cent, awarded her an "indicative settlement sum payable to her of $741,634, subject to further consideration of any successful damages claim" by Mr Daily against R Lawyers. It is unclear exactly what he would have been liable to pay Ms Daily if the BFA had been enforceable. However, In *Daily v Daily* [2024] FedCFamC1F 47 (at [7]), the husband's submissions on his quantum of damages in negligence were that:'… pursuant to the BFA, the husband would have satisfied his obligations by paying the wife the sum of $215,291 (BFA settlement) and she would have also retained some other assets.
[18] *Daily v Daily (No 3)* [2024] FedCFamC1F 47.
[19] *Daily v Daily (No 4)* [2024] FedCFamC1A 185 [70].
[20] *Daily v Daily (No 4)* [2024] FedCFamC1A 185 [143].

The solicitors' negligence

The Division 1 court found that R Lawyers had been negligent in the legal advice they provided Mr Daily about the BFA. Of significance was that Mr Daily's solicitor spent only 30 minutes assisting and advising Mr Daily on the final BFA's execution[21] - a duration which, according to Berman J, 'might be considered an unnecessarily short period of time to properly allow consideration of' the BFA and other relevant matters.[22] The primary judge also considered it significant that 'the topic of what would happen upon the birth of a child and whether that might represent a material change in circumstances was not raised by [the solicitor]',[23] and found the advice provided 'did not rise above the suggested pro-forma letter extracted from the CCH loose leaf reporting service'.[24]

Although Berman J found Mr Daily 'was aware of the risk of the BFA being set aside', his Honour considered R Lawyers' advice fell 'significantly short' of the duty of care a lawyer who represented themselves as being an Accredited Family Law Specialist, owed to their client. Berman J quoted Malcom AJA in *Heydon v NRMA*, that a solicitors' duty of care is to:

> *exercise reasonable care and skill in the provision of professional advice … In the case of practitioners professing to have a special skill in a particular area of law, the standard of care required is that of the ordinary skilled person exercising and professing to have that special skill.* [25]

Berman J found that the solicitor's exercise of reasonable care did not need to 'ensure any particular result',[26] but that Mr Daily 'was entitled to assume' that the solicitor 'could provide comprehensive advice' on the BFA's provisions and 'the integrity of the document namely, whether there was a risk that it could be considered as void for uncertainty', given the solicitor's previous experience in drafting financial agreements and being an Accredited Family Law Specialist.[27] The Appellate Court upheld these findings on negligence.

Damages claimed

Mr Daily's claim for damages consisted of two components. The first related to the 'recovery of damages for the legal costs he incurred in litigating whether the BFA was void for uncertainty which had been wasted given the setting aside of the BFA on that

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[21] *Daily v Daily (No 4)* [2024] FedFamC1A 185 [92].
[22] *Daily v Daily* [2023] FedCFamC1F 222 [407].
[23] Ibid [403].
[24] Ibid [408].
[25] Ibid [411], quoting *Heydon v NRMA Ltd & Ors* [2000] NSWCA 374 [145] referring to *Rogers v Whitaker* (1992) 175 CLR 479.
[26] Ibid [412] – [414].
[27] Ibid [410].

ground'.[28] The second component of his claim was that, due to R Lawyers' negligence, he was financially worse off as a result of the s 79 property orders.[29] Berman J accepted Mr Daily had sustained costs in wasted litigation of the uncertainty ground only, but rejected the second component of his claim regarding the s79 property settlement. Given that Mr Daily did not adduce 'evidence as to the breakdown of his costs' in the primary proceedings, the 'somewhat surprising result' was that the assessment of damages for wasted litigation costs was based on R Lawyers' concession 'that $38,000 should be awarded'.[30] The Appellate Court allowed Mr Daily's appeal against the primary judge's refusal to award any compensation for the second component of claim.

Issues in the High Court

The lower courts' negligence findings were not disputed further in R Lawyers' appeal to the High Court. Rather, the initial appeal grounds were that Mr Daily's action should fail as it was statute barred under s 35 of the *Limitation of Actions Act 1936* (SA), which states that claims in both contract and negligence must be commenced within six years of when the cause of action accrued. R Lawyers contended that Mr Daily's negligence claim was statute barred because loss 'occurred at the time the BFA was entered into or at the time of his marriage' in 2005; Mr Daily argued the loss occurred upon separation in 2018.[31]

R Lawyers were granted leave to amend their notice of appeal in relation to the second component of damages, to contend that given that Mr Daily had not adduced evidence of 'what the terms of a financial agreement prepared with reasonable care and skill would or might have been,' the Appellate Court erred in compensating for the second component of Mr Daily's claim.[32] Consequently, before determining whether the claim was statute barred, the High Court first had to consider the nature of Mr Daily's loss arising from the solicitor's negligence, and whether Mr Daily had adduced evidence as to that loss.

Two separate judgments were delivered by (1) Gageler CJ, Jagot and Beech-Jones JJ, ('the plurality') and (2) Gordon and Edelman JJ. Both judgments concluded Mr Daily's negligence claim was not statute barred, but that he had failed to adduce evidence of loss arising from the defective agreement and, therefore, the Appellate Court's order to remit the assessment of damages regarding his claim of being financially worse off due to the defective BFA was 'bound to fail'.[33]

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[28] *R Lawyers v Mr Daily* [2025] HCA 41 [22].
[29] Ibid [23].
[30] Ibid [126].
[31] Ibid [4].
[32] Ibid [37].
[33] Ibid [47].

High Court Findings

Mr Daily's negligence claim was not statute barred

The High Court confirmed that any action in contract accrued upon the breach of the contractual standard, when the defective performance occurred and became statute barred by around 2011.[34] R Lawyers contended that Mr Daily's negligence claim was also statute barred.

The court spent some time considering the different measures of damages in tort and contract,[35] and whether Mr Daily's interests in the BFA were akin to contractual rights.[36] Unlike breach of contract, negligence is only actionable once damage has been sustained, and therefore the statute of limitations time does not start for a negligence action until the actual damage occurs.[37] Therefore, whether Mr Daily's negligence action was statute barred depended on whether his loss could be characterised as being sustained upon entering the financial agreement, or only upon separation.

R Lawyers argued the case was analogous to *Davys Burton*,[38] where the New Zealand Supreme Court found a client 'suffered an immediate loss on his marriage without the protection of a valid agreement' due to the client's lawyers' negligence.[39] In dismissing this argument and ground of appeal, both judgments concluded that the nature of the loss suffered by Mr Daily was contingent upon separation, because the operation of relevant provisions under the *FLA* meant that 'R Lawyers' negligence did not cause Mr Daily to incur any loss or damage until the time he separated from Ms Daily'.[40] In distinguishing *Daily* from *Davys Burton*, the plurality commented that, 'Although a financial agreement has features of an agreement or simple contract, it is also very much a creature of statute'.[41] Unlike the New Zealand statutory provisions in *Davys Burton*, which attached immediately upon marriage,[42] the plurality considered Daily's case was more similar to the Australian case of *Cornwell*:[43]

> *where it was held that actual loss was not sustained by an employee who was advised in 1965 that he was not eligible to join a superannuation fund created by a public service statutory superannuation scheme until his retirement in 1994,*

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[34] Ibid [53] (plurality).
[35] Ibid [141]-[144] (Gordon and Edelman JJ).
[36] Ibid [53]-[66] (plurality).
[37] Ibid [54] (plurality).
[38] *Davys Burton v Thom* [2009] 1 NZLR 437.
[39] *R Lawyers v Mr Daily* [2025] HCA 41 [62]-[63] (plurality).
[40] Ibid [5] (plurality); see also [176]-[178] (Gordon and Edelman JJ).
[41] Ibid [65].
[42] Ibid [65], quoting *Davys Burton* at 451 [24].
[43] *Commonwealth v Cornwell* (2007) 229 CLR 519.

> *when he received a lesser benefit than that which he would have received had he joined the scheme in 1965.*[44]

They concluded that Daily's losses resulting from R Lawyers' negligence were therefore contingent on separation within the context of the *FLA* statutory scheme, and 'not of a kind similar to a party's interests in a bundle of contractual rights in a commercial agreement.'[45] Because damage is an element of negligence, this meant that Mr Daily's cause in negligence was not actionable until that contingency eventuated; that is, upon separation.

Gordon and Edelman JJ did not consider *Cornwell*, but similarly concluded that BFAs under the *FLA* are unlike other agreements, in that:

> *the combined effect of ss 90B, 90DA and 90DB of the FLA is that a financial agreement entered into before marriage is of no force or effect in relation to the property or financial resources of either or both of the spouse parties until a separation declaration is made and, in relation to other matters, unless and until the marriage breaks down.*[46]

Consequently, the High Court determined that Mr Daily's negligence action only arose upon his separation from Ms Daily in 2018, not when the BFA was entered into in 2005, and was not statute barred.

Mr Daily could only recover the costs of wasted litigation on the uncertainty ground

As noted earlier, Mr Daily's claimed losses had two components: his wasted costs in defending the validity of the BFA;[47] and the second component, him being 'financially worse off as a result of the outcome of Ms Daily's application for orders under s 79 of the *FLA*'.[48] Although the High Court found that Daily's negligence claim was not statute barred, it accepted R Lawyers' argument that the Appellate Court's orders to remit the assessment of the second component of damages Mr Daily claimed for rehearing was 'bound to fail',[49] and upheld the primary judge's determination that he could only recover his wasted litigation costs for the uncertainty ground.

In the Division 1 court proceedings, Mr Daily put forward two counterfactuals as to why he would have been in a better position had R Lawyers not been negligent. The first was that he would not have married or had children with Ms Daily 'unless

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[44] *R Lawyers v Mr Daily* [2025] HCA 41 [56] (plurality).
[45] Ibid [66] (plurality).
[46] Ibid [175] (Gordon and Edelman JJ).
[47] Ibid [22] (plurality).
[48] Ibid [23] (plurality).
[49] Ibid [47] (plurality).

absolutely certain that the BFA would be held to be valid if it were to be challenged'.[50] The second was that he would have reached an agreement with the wife that made sufficient provision for any child of the marriage so that it could not have been set aside under s90K(1)(d) of the *FLA*.[51]

The first counterfactual was rejected by the primary judge who was not satisfied Mr Daily would not have married Ms Daily without an 'assurance of certainty' of the BFA being enforceable.[52] This issue was not pursued further in the High Court.[53] The second counterfactual was also rejected in the primary proceedings[54], but was accepted by the Appellate Court, where it was characterised 'as a claim for a "loss of chance"; specifically, the "lost opportunity to negotiate a BFA which made provision for the birth of a child or children"'.[55]

In the High Court the question arose whether Mr Daily's claimed loss should have been characterised as the 'loss of a particular outcome' or 'loss of a chance' to enter into an effective BFA.[56] However, the High Court did not reach a conclusion in relation to the question, because the arguments run in Daily 'did not address whether the second component of Mr Daily's claim *could* be framed as a claim for a lost opportunity. Instead, [they] addressed how Mr Daily *in fact framed* this second component of his case' (original emphasis).[57] The plurality considered Mr Daily had 'contended that his case was that he suffered a loss in the form of a diminution of his interest in securing a binding financial agreement that was not liable to be set aside under the *FLA* '[58] and that 'Until the hearing before the Appellate Court, Mr Daily's claim was not framed as a loss of chance case'.[59] Because, in their view, it was not 'apparent that Mr Daily could have proved the loss of a chance of any value given that, irrespective of the invalidity of the BFA for uncertainty as found below, the BFA was always vulnerable to be set aside on any of the other grounds in s 90K(1) of the FLA' , their Honours concluded the 'case should have risen or fallen before the Appellate Court on the basis of his alleged loss as put before the Division 1 Court'.[60] The plurality concluded that, fatal to the second component of Mr Daily's claim, was the fact the primary judge found that Mr Daily had not instructed his lawyers 'to the effect that he wanted a financial agreement that "was effectively bullet proof against the application of s

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[50] Ibid [44] (plurality).
[51] Ibid.
[52] Ibid [27].
[53] Ibid [28], [94].
[54] Ibid [24].
[55] Ibid [31].
[56] Ibid [158].
[57] Ibid [43] (plurality).
[58] Ibid [34].
[59] Ibid [45].
[60] Ibid.

90K(1)(d)"' and had also failed to evidence terms of a financial agreement that would have avoided application of s 90K(1)(d)"'.[61]

Gordon and Edelman JJ considered:

> *There was a lack of clarity in the manner in which Mr Daily's claim for damages for negligence was pleaded, conducted in the courts and decided. Sometimes, the argument for Mr Daily was framed in terms suggesting that his loss was the loss of a particular outcome. But at other times, those arguing Mr Daily's case used the language of the loss of a chance. This confusion has persisted in the argument in this Court where counsel for Mr Daily denied that he ever made a loss of chance case and counsel for R Lawyers submitted that was the only case he had ever advanced since the quantum hearing.*[62]

Their Honours came to similar conclusions to the plurality that 'it is far from clear that Mr Daily pleaded his case, or conducted his case [in the Division 1 Court], based on a loss of opportunity to obtain a financial agreement and thereby obtain a more favourable property settlement' and, consequentially, the Appellate Court 'misunderstood and misstated the way in which Mr Daily had put his case … and why the primary judge had rejected that case.'[63]

Mr Daily failed to prove the loss of not having an enforceable BFA

Regardless of the characterisation of the second component of Mr Daily's loss, both judgments also considered his claim was 'bound to fail' as he had failed to 'adduce evidence establishing the *fact* of loss beyond the litigation costs wasted' on litigating the uncertainty ground.[64] As Gordon and Edelman JJ put it:

> *regardless of whether Mr Daily argued a case based on the loss of a particular outcome or the loss of a chance, the primary judge was correct to find that Mr Daily did not prove that he had suffered any loss (apart from his legal fees in relation to the uncertainty claim).*[65]

R Lawyers contended by way of an amended notice of appeal that 'Mr Daily did not adduce evidence of what the terms of a financial agreement prepared with reasonable care and skill would or might have been'[66] in earlier proceedings, to support his counterfactual arguments. This created an issue, according to the plurality, because if Mr Daily had failed to adduce evidence of his loss, upholding the Appellate Court's

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[61] Ibid [46].
[62] Ibid [158] (Gordon and Edelman JJ).
[63] Ibid [139].
[64] Ibid [47].
[65] Ibid [159].
[66] Ibid [37].

orders of a rehearing would 'seemingly' enable Mr Daily to 'rerun or supplement his case by evidence that he should have adduced at trial'.[67]

In upholding this ground of R Lawyers' appeal, the plurality outlined that, in order to successfully prove this component of damage, Mr Daily 'would have had to identify at least the scope, nature and likely monetary amount or range of monetary amounts that any provision for children would have entailed.'[68] They considered that 'In some lawyer negligence cases a court can infer the particular steps that might have been taken had the lawyer discharged their duty',[69] and that 'precise terms of the counterfactual financial agreement' were not required to prove Mr Daily suffered loss resulting from R Lawyers' negligence.[70] However, 'what such a financial agreement should have provided in this case if there were children of the marriage could not be … inferred'.[71] While the primary judge found that 'R Lawyers failed to advise Mr Daily "what would happen upon the birth of a child and whether that might represent a material change in circumstances"',[72] he had not actually adduced evidence:

- On what 'form of financial agreement … a lawyer in 2005, exercising reasonable care and skill, would (or might) have drafted to avoid that financial agreement being set aside and to have that financial agreement be effective upon separation'; or
- To support the inference that 'Ms Daily would (or might) have agreed to such a financial agreement around that time'.[73]

Their Honours considered that:

> *Unless that was done there could not be any assessment of whether Ms Daily would (or may) have agreed to such a financial agreement, whether it would or may have survived a challenge on hardship grounds many years later and, if so, whether it would have secured a better outcome for Mr Daily compared to the orders the Division 1 Court made under s 79 of the FLA.*[74]

Gordon and Edelman JJ similarly concluded that Mr Daily 'adduced no evidence at the trial of what the terms of an alternative financial agreement would have been', and therefore, 'the Appellate Court had erred in remitting that component of damages for assessment.[75] Their Honours went further in their judgment in detailing what evidence a plaintiff would be required to prove, depending on whether a plaintiff claimed a loss of a

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[67] Ibid [40].
[68] Ibid [50].
[69] Ibid [49].
[70] Ibid [50].
[71] Ibid [49].
[72] Ibid [48].
[73] Ibid [47].
[74] Ibid [50].
[75] Ibid [161].

particular outcome versus loss of an opportunity. On the 'loss of a particular outcome' argument, Mr Daily's case failed due to the lack of evidence 'of the terms that the financial agreement should have contained, evidence that Ms Daily would have agreed to those terms prior to separation, and evidence that that financial agreement would have remained on foot and been enforceable at separation'.[76] On the 'loss of opportunity' to obtain a different BFA argument, their Honours determined he would need to have proved 'the substance of the terms' the BFA might have contained; whether the wife might have agreed to them; and that the BFA might have been enforceable upon separation.[77] Both characterisations of loss would also require proving 'what terms were required in the financial agreement to avoid it being set aside under s 90K(1)(d) of the FLA on hardship grounds';[78] this would be difficult 'if not insuperable' for both characterisations of loss.[79]

The High Court consequently found the primary judge had been correct in concluding the only assessable damages that could be awarded to Mr Daily were $38,000 in damages for his wasted litigation costs in unsuccessfully defending the uncertainty issue. The Appellate Court's order to remit the second component of damages in relation to the result of the s 79 orders was overturned.

Implications for legal practice

The concerns of family lawyers that claims can arise many years after advising on BFAs are somewhat borne out.[80] The High Court's finding that loss suffered by parties to a BFA crystallises upon separation means that lawyers who have advised clients on a financial agreement entered into before or early in a marriage or de facto relationship, may face negligence claims many years into the future. Given this, family lawyers should ensure their professional indemnity insurance provides run-off cover after the lawyer is no longer practicing or has retired.[81] Moreover, unlike many other client files that may be destroyed after 7 years, it is sensible practice to ensure that BFA files are stored indefinitely.

The lower courts clarify that the duty of care expected of lawyers who represent themselves as Accredited Family Law Specialists is not to 'ensure any particular result'[82] but does need to amount to 'comprehensive advice'.[83] In particular, solicitors

[76] Ibid.
[77] Ibid [169].
[78] Ibid [170].
[79] Ibid,
[80] Kaye et al (n7) 59.
[81] https://www.lawsociety.com.au/practising-law-in-NSW/ethics-and-compliance/regulatory-compliance/leaving
[82] *Daily v Daily* [2023] FedCFamC1F 222 [412].
[83] Ibid [414].

should provide more than 'proforma' advice to clients; bespoke advice for the parties in question is required. Lawyers should ensure clients are clearly advised in writing on the risk that an agreement could be non-binding or be set aside. Financial agreements should contain sufficiently clear provisions about arrangements for any possible children of the relationship and ensure that clients are provided written advice as to whether the birth of a child or other life events relating to children could represent a material change in circumstances which might result in an agreement being set aside. Clients should be asked to acknowledge such advice in writing.

However, it is important to note that where a BFA is or could be set aside on hardship grounds, *Daily* suggests plaintiff clients will find it very difficult to prove loss arising from their lawyers' negligence (beyond wasted legal fees). Any potential plaintiff needs to prove the terms of a properly drafted agreement that would have remained enforceable despite the many grounds upon which a BFA can potentially be set aside. Additionally, they would have the very difficult task of adducing evidence that both parties would have entered that agreement on those terms and that the agreement would have resulted in a better outcome for the plaintiff than a s79 claim. In the absence of evidence that the plaintiff would have been better off (and how and to what extent), a court will be left to conclude that there has been no loss. Despite implicit criticisms of Mr Daily's evidence in the judgments, it is difficult to envisage how he could have adduced the necessary evidence which would have supported his claim.

The high evidentiary hurdles for plaintiffs provide some reassurance for family law practitioners. Mr Daily only received $38,000 damages but spent many times more than that in legal costs.[84] He was additionally ordered to pay R Lawyers' costs of the High Court proceedings. After *Daily*, lawyers advising a potential plaintiff will carefully consider the commercial wisdom of bringing a negligence claim in relation to a BFA.

[84] The exact legal expenses are unclear, but Mr Daily claimed that, as of 30 June 2022 he had spent a total of $483,033 on the various litigation (*Daily & Daily (No 4)* [2024] FedCFamC1A 18 [52]. The Appellate Court further commented that 'the husband had used his superannuation to fund his legal fees to the point where, by February 2024 [before the High Court matter even commenced], there was little left.' ([65]).